BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DEBORAH HARRIS Claimant	)	
VS.	)	Docket No. 1,058,976
COMFORT KEEPERS Respondent	)	
AND	)	
ACE FIRE UNDERWRITERS INS. CO. Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier appealed the February 23, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. Donald T. Taylor of Kansas City, Kansas, appeared for claimant. Kevin M. Johnson of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the February 22, 2012, preliminary hearing and exhibits thereto, and all pleadings contained in the administrative file.

ISSUES

Claimant suffered a slip and fall accident on December 2, 2011, while employed by respondent. Respondent, which is a staffing agency, assigned claimant to work for Overland Park Place (OPP). Claimant would report to OPP to work every day and apparently clocked in and out at OPP. Claimant was not asked how long she had worked at OPP while employed by respondent. Claimant clocked out after finishing her shift at OPP and was leaving the building when she fell on the front steps. The property where OPP is located is owned by FSQ Overland Park Place Business Trust.

The ALJ impliedly determined claimant sustained her burden of proof that she suffered a personal injury by accident arising out of and in the course of her employment. Respondent appeals and argues that claimant's accident occurred off respondent's premises and after claimant completed her shift. Therefore, the accident did not arise out of and in the course of her employment with respondent.

Respondent also contended claimant's fall was the result of a "neutral risk" or arose from an idiopathic cause and, therefore, her injuries are not compensable under the 2011 amendments to the Kansas Workers Compensation Act. Respondent did not raise these defenses at the preliminary hearing. Claimant asks the Board to affirm the ALJ's preliminary Order. The issue for the Board's review is:

Did claimant's accidental injury arise out of and in the course of her employment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

At the time of the preliminary hearing claimant had worked for respondent for approximately five and one-half years. On December 2, 2011, claimant's job was to provide assistance for patients of Overland Park Place (OPP), one of respondent's clients. Respondent is a staffing agency that provides CNAs to various facilities across the Kansas City area. Claimant was required by respondent to report each working day at OPP and she takes care of patients there.

On December 2, 2011, claimant finished her shift at 10:00 p.m. and clocked out. As she was leaving the building, claimant descended the front steps of the building where she worked and slipped on the carpeted steps, which were wet from rain, and fell. The steps are exposed to the elements. When claimant was asked by the ALJ what caused her to fall, she replied, "I don't know."[1] She also testified that she "went out the door and was going down the steps and I just fell."[2] As a result of the fall, claimant suffered injuries to the back of her head, left leg and back. Respondent sent claimant to Dr. William H. Tiemann for medical treatment. After seeing Dr. Tiemann on December 7 and 9, 2011, claimant was refused treatment because respondent decided the accident was not work related.

Claimant testified she chose to park in front of the building and exit via the front door and down the steps. She could have parked in the rear of the building and entered and

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[1] P.H. Trans. at 21.

[2] *Id.*, at 7.

exited the building through the back door, which had a flat entrance. Claimant indicated there was no particular reason she parked in front of the building, but on one occasion she had seen an animal in the rear of the building that scared her. She did obtain permission from the administrator of OPP to park in the front of the building.

The property where OPP is located is owned by FSQ Overland Park Place Business Trust (FSQ). A deed for the property was made an exhibit at the preliminary hearing. However, no testimony was presented concerning the relationship between OPP and FSQ. Only claimant testified at the preliminary hearing.

The ALJ impliedly found claimant sustained a personal injury by accident arising out of and in the course of her employment with respondent, and he ordered medical treatment with Dr. Tiemann. In his preliminary Order, the ALJ stated:

> This was essentially a principal-contractor arrangement where the work of Overland Park Place was hired out to Comfort Keepers. The claimant was doing the work of Overland Park Place and Comfort Keepers and both those entities employed the claimant. The workers compensation act specifically recognizes such dual employment scenarios in K.S.A. 44-503 which holds a principal liable for injuries to employees of an uninsured contractor. Furthermore, the notion of "premises" does not require that the employer own the real estate. An employer's premises is the place where the employer does business, whether the place be owned or rented. These findings are consistent with *Butera*.
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> The claimant was on her employer's premises when the injury occurred, so the going and coming exception does not apply. . . .[3]

Claimant asserts OPP had control over the property. Respondent asserted no evidence was presented to prove who has control over the property. In its brief to the Board, respondent asserted, for the first time, that claimant's accident and injury were the result of a neutral risk or idiopathic cause and, thus, not compensable pursuant to K.S.A. 2011 Supp. 44-508 (New Act). Therefore, the ALJ did not address this issue in his preliminary Order.

At the preliminary hearing, the following discourse took place between the ALJ and respondent's attorney:

> THE COURT: Thank you. We talked about this briefly before we started the record. I understand the claimant's request today is for medical treatment for the alleged injury.

[3] ALJ Order (Feb. 23, 2012) at 2.

The respondent is denying whether this is an injury arising out of and in the course of employment specifically under the going and coming exception?

MR. JOHNSON: Yes, sir.[4]

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f)(3) states in part:

(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

(B) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard connected with the nature of the employment that is not a risk or hazard to which the general public is exposed and which is a route not used by the public except in dealings with the employer. . . .

In *Hilyard*,[5] the Kansas Supreme Court stated:

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[4] P.H. Trans. at 3.

[5] *Hilyard v. Lohmann-Johnson Drilling Co.*, 168 Kan. 177, 182, 211 P.2d 89 (1949); see also *Bailey v. Mosby Hotel Co.*, 160 Kan. 258, 267, 160 P.2d 701 (1945); *Thomas v. Proctor & Gamble Mfg. Co.*, 104 Kan. 432, 179 Pac. 372 (1919).

> The words 'causal connection' certainly do not mean that the accident must have resulted directly and immediately from performance of the work for which the workman was employed. Such a narrowed interpretation would mean that whenever a workman was not directly engaged in the actual work to be done he would be without protection under the law.

In *Bright*,[6] the Kansas Supreme Court held: "A worker may be the employee of two employers, not joint employers, at one time as to one act, if the service to one does not involve abandonment of the service to the other."

In *Scott*,[7] the Kansas Supreme Court held: "The term 'special employee' refers to a lent employee. A special employee becomes the servant of the special employer and assumes the same position as a regular employee for purposes of the Workers Compensation Act."

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[9]

ANALYSIS

At the time of her accidental injury, claimant was employed by respondent, a staffing agency. She had been placed by that staffing agency at OPP and worked there on a regular basis. OPP stood in the shoes of claimant's employer such that the premises of OPP constituted the premises of claimant's employer for the purposes of K.S.A. 2011 Supp. 44-508(f)(3)(B).

Respondent's argument that the property where claimant was injured was owned by FSQ and not OPP is without merit. OPP was the place of business where claimant worked each day. Claimant fell on the steps of a building operated by OPP. Claimant's testimony is sufficient to establish that OPP controlled the building where it operated. Claimant testified that she asked the administrator of OPP to park in front of the building. This establishes that OPP had control over the building and parking. This Board Member

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[6] *Bright v. Cargill, Inc.*, 251 Kan. 387, Syl. ¶ 7, 837 P.2d 348 (1992).

[7] *Scott v. Altmar, Inc.*, 272 Kan. 1280, Syl. ¶ 4, 38 P.3d 673 (2002).

[8] K.S.A. 44-534a.

[9] K.S.A. 2011 Supp. 44-555c(k).

finds that claimant was on the premises of respondent when she slipped on the wet steps and was injured.

Respondent argues that because claimant testified she did not know why she fell, her injury did not arise out of and in the course of her employment. In its brief to the Board, respondent correctly stated that K.S.A. 44-508(f)(3)(A) provides that "arising out of and in the course of employment" shall not be construed to include (1) an injury which occurred as a result of the natural aging process or a normal activity of day-to-day living; (2) an accident or injury which arose out of a neutral risk; (3) an accident or injury which arose out of a risk personal to the worker; or (4) an accident or injury which arose directly or indirectly from idiopathic causes. Respondent, in essence, argues that claimant's fall and injuries were the result of a neutral risk or idiopathic cause. However, respondent did not raise these defenses at the preliminary hearing.

This Board Member will not consider the new defenses of respondent that claimant's accident and resulting injury were the result of a neutral risk or idiopathic cause. A claimant has the burden of proving his or her injury arose out of and in the course of her employment. When a respondent alleges that one of the exceptions in K.S.A. 2011 Supp. 44-508(f)(3)(A) applies, due process and fundamental fairness dictate that respondent must raise those defenses at the preliminary hearing. Had respondent indicated at the preliminary hearing that it was asserting neutral risk and idiopathic cause as defenses, claimant might have proceeded differently. In addition, ALJ Hursh was not afforded an opportunity to determine if those defenses had merit. Should respondent want those defenses considered by the ALJ, it should say so at the time of regular hearing or request another preliminary hearing.

CONCLUSION

Claimant proved by a preponderance of the evidence that her personal injury by accident arose out of and in the course of her employment. This Board Member will not consider the defenses raised by respondent for the first time on appeal that claimant's accident and resulting injury were the result of a neutral risk or idiopathic cause.

WHEREFORE, the undersigned Board Member affirms the February 23, 2012, preliminary hearing Order entered by ALJ Hursh.

IT IS SO ORDERED.

Dated this ____ day of April, 2012.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

c: Donald T. Taylor, Attorney for Claimant
dontay@kc.rr.com

Kevin M. Johnson, Attorney for Respondent and its Insurance Carrier
kjohnson@wsabe.com

Kenneth J. Hursh, Administrative Law Judge